85-517

Supreme Court, U.S.
FILED
SEP 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-_____

In the Supreme Court of the United States

October Term, 1985

MILTON A. MILLER and MANDEL M. MILLER,

Petitioners,

v.

CITY OF LOS ANGELES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does an adequate *state* remedy exist—sufficient to bar federal court jurisdiction—because state courts have concurrent jurisdiction with federal courts to consider *federal* questions under the Civil Rights Act (42 USC §1983)?

2. Is it Constitutionally permissible for a local government agency to condemn property and then assess the owner of the condemned property for his own judicially determined just compensation *and* for the Agency's costs in litigating the condemnation action?

3. May a U.S. District Court review the Constitutionality of a special assessment for the cost of street widening, levied against only two property owners (whose property will be reduced in value by the street widening), because it is not a "tax" which is shielded from such review by the concept of comity?

4. If the special assessment is a tax, is its Constitutionality nonetheless reviewable in U.S. District Court because the scheme by which it is imposed is facially incapable of providing due process of law?

5. If the special assessment is a tax, is its Constitutionality nonetheless reviewable in U.S. District Court because state law provides no plain, adequate, and complete remedy, as the statutory scheme:

- fails to provide Constitutionally adequate notice;
- accords conclusive effect to decisions of a city council;
- prohibits virtually all judicial review; and
- is strictly enforced by the state judiciary against all challenges?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

All parties are listed in the caption.

The Petitioners respectfully pray that a Writ of Certiorari issue to review a judgment and order of the United States Court of Appeals for the Ninth Circuit.*

OPINIONS BELOW

The opinion of the Court of Appeals (App A) is reported as *Miller v. City of Los Angeles* (9th Cir 1985) 755 F 2d 1390. The District Court's opinion (App C) was not published.

*All parties are listed in the caption.

JURISDICTION

This case involves a scheme by which the City of Los Angeles seeks to widen the street in front of the Millers' small convenience shopping center and then, after determining the amount of just compensation due the Millers for taking part of their property for the street widening, assess the Millers the cost of their own just compensation on the pretext that they are specially benefitted by the widening. To rub salt in this wound, the Millers will also be assessed the City's litigation costs in the condemnation proceeding. Worse than that, such an assessment is theoretically *only* to be imposed if the project will *benefit* the assessed property when, in fact, this project will severely damage the Millers by eliminating needed on-site parking for their merchant tenants.

The Millers sought the assistance of the District Court (pursuant to 28 USC §§1331 and 1343) because of the unconstitutionality of this perversion of the just compensation guarantee of the Fifth and Fourteenth Amendments and the inability of state law to provide relief.

The District Court believed that dismissal was required by the principles of comity discussed in *Fair Assessment In Real Estate v. McNary* (1981) 454 US 100, i.e., federal courts should review state tax schemes only if there is no plain, adequate, and complete remedy provided by state law.

The District Court's Memorandum Decision and Order dismissing the action was filed March 14, 1983. (App C) An Order denying the Millers' motion to reconsider was filed May 11, 1983. (App D)

The Court of Appeal's judgment affirming the dismissal was filed March 23, 1985. (App A) The timely

Petition for Rehearing was denied June 25, 1985. (App B)

This Court's jurisdiction is invoked pursuant to 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

> ". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "SECTION 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

California Streets and Highways Code §§5000, 5003, 5023.1, 5024, 5050, 5051, 5052, 5060, 5061, 5062, 5063, 5065, 5070, 5071, 5072, 5131, 5132, 5133, 5180, 5190, 5191, 5192, 5193, 5193.1, 5194, 5195, 5196, 5197, 5198, 5220, 5221, 5341, 5342, 5343, 5360, 5362, 5363, 5368, 5369, 5660 and California Public Contract Code §§20410, 20420, 20431, 20432, 20434, 20435 are reproduced in App E.

STATEMENT OF THE CASE[1]

The Millers own a small property in the City of Los Angeles which is improved as a neighborhood convenience shopping center. They operate a pharmacy on part of the subject property and lease the remainder to a laundry, an upholstery shop, a recording studio, and a liquor store. On the property, between the stores and the street, is a parking lot. On-site parking, in front

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[1]As the District Court dismissed the action without an evidentiary hearing, the facts are drawn from the Complaint. (*Rosewell v. LaSalle National Bank* [1981] 450 US 503, 506, fn. 3)

of the stores, is indispensable to the patronage of their drug store and their tenants. Convenience stores without convenient parking cannot survive. Recognizing the necessity of convenient parking, the City requires all commercial enterprises to have on-site parking. (L.A. Muni. Code §12.21)

The City proposes to widen the street in front of the subject property. The widening is to be accomplished by condemning the front 20 feet of the subject property, eliminating the parking lot.

The Millers are entitled to just compensation for property which is taken from them for public use. (U.S. Const., 5th and 14th Amendments)

The City scheme renders meaningless the Constitutional promise of just compensation.[2]

The City's project is being financed under the Improvement Act of 1911 (the 1911 Act), which is codified in Streets & Hwys. Code §5000 et seq. and Pub Cont Code §20410 et seq.[3]

The City plans to:

- condemn the Millers' parking lot and pay whatever just compensation is judicially ordered; and then
- assess the Millers the amount of the court-awarded just compensation *plus* the City's cost of litigating the condemnation action; so that
- the Millers will end up paying themselves their own just compensation—and then some.

Thus, notwithstanding the Constitutional guarantee of just compensation, the City proposes to confiscate

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[2]The scheme is described in detail at pp 18-23.

[3]Pertinent portions of the 1911 Act are reproduced in App E.

the property it needs for street widening. It doesn't matter to the City how much is awarded at the condemnation trial. Any verdict for the Millers will correspondingly increase the assessment against the Millers. The City gets a widened street, and the Millers' pay for it.

The *theory* of the 1911 Act is benign when used where the properties in the assessment district will *benefit* from the project. Each property benefited is then assessed an amount equal to the benefit received.

The City, however, has perverted that benign process. A major street is being widened, but only two properties supposedly benefited. Importantly, the Millers' property not only receives *no benefit* from the street widening, it indisputably suffers harm.

The City gains a wider street. The Millers lose their parking lot. As a result, the value of their "convenience" shopping area is reduced. The Millers receive nothing for the property taken, or the reduced value of their remaining property.

Such high-handed piracy cannot pass Constitutional muster.

Moreover, the procedures set up in the 1911 Act provide no due process protection to property owners. Indeed, it is a blatant example of due process denial. It is designed in such a way that all decisions of the city council are final, conclusive, and insulated from judicial review. (See, e.g., Streets & Hwys Code §§5003, 5221, 5368, 5369.)

Section 5003 states the generality:

> "*No error,* irregularity, informality, and *no neglect* or omission of *any officer,* in *any procedure* taken under this division, which does not directly affect the jurisdiction of the

> legislative body to order the work or improvement, shall avoid or invalidate such proceeding or any assessment for the cost of work done thereunder. *The exclusive remedy of any person affected or aggrieved thereby shall be by appeal to the legislative body in accordance with the provisions of this division."* (Emphasis added.)

NORMAL JUDICIAL REVIEW IS *EXPRESSLY PROHIBITED* by Section 5369:

> "*No assessment, . . . and no proceedings* prior to the assessment, *shall be held invalid by any court for any error,* informality, *or other defect* in the same, where the resolution of intention of the legislative body to do the work, has been actually published as provided in this division." (Emphasis added.)

The District Court found that this scheme provides property owners with remedies which are ". . . plain, adequate and complete." (App D, p A13)

Because the District Court believed this suit challenged a state tax system which contained plain, adequate, and complete remedies, the action was dismissed. (App C, p A10; App D, p A13) The Court of Appeals affirmed, in a brief opinion containing virtually no facts or analysis. (App A)

REASONS FOR GRANTING THE WRIT

INTRODUCTION

In less than one published page,[4] the Ninth Circuit Court of Appeals:

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[4]The entire opinion of the Court of Appeals fits comfortably on page 1391 of 755 F 2d.

- defied the teachings of this Court in a long line of cases beginning with *McNeese v. Board of Education* (1963) 373 US 668, 671-673 and re-affirmed in *Patsy v. Florida Bd of Regents* (1982) 457 US 496, 500-507, holding that state judicial remedies are no substitute for federal court review in Civil Rights Act (42 USC §1983) cases; and

- approved, as providing adequate legal remedies, a state scheme for financing public improvements which violates at least four settled Constitutional precepts of this Court.

The state scheme approved by the Ninth Circuit (and utilized by the City of Los Angeles to finance the widening of a street in front of the Millers' property):

- provides Constitutionally inadequate notice by publication of all cricital determinations, in violation of *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 US 306 and *Mennonite Board of Missions v. Adams* (1983) 462 US 791, ___, 77 L Ed 2d 180, 182;

- permits a government agency to condemn private property for a public project and then assess the owner whose land was condemned the full amount of his just compensation plus the government's attorneys' and appraisers' fees, in violation of *Norwood v. Baker* (1898) 172 US 269;

- permits administrative agencies to operate without judicial review, in violation of *St. Joseph Stock Yards Co. v. U.S.* (1936) 298 US 38, 51-52; and

- permits a bureaucrat (rather than a court) to determine special benefits (a component of just compensation), in violation of *Monongahela Navigation Co. v. U.S.* (1893) 148 US 312, 327.

These manifold violations were condoned in the name of "comity," the Court of Appeals expressing the belief that this Court's decision in *Fair Assessment in Real Estate v. McNary* (1981) 454 US 100 compelled the result.

With respect, this conclusion was reached by the Ninth Circuit with virtually no analysis. Rather than *examining* the state scheme to determine whether it provided a ". . . plain, adequate, and complete . . ." remedy for the Millers (*Fair Assessment,* 454 US at 116), the Ninth Circuit simply *assumed* that there was a remedy, notwithstanding the numerous Constitutional infirmities in the state scheme noted above. Such short shrift conflicts with all other post-*Fair Assessment* cases from other Circuits. Elsewhere, state schemes have been subjected to searching review before deciding whether the state procedure *actually* provides relief. *After* such review, some courts have declined review,[5] while others have accepted jurisdiction and addressed the merits.[6]

This Court's attention is needed on three issues of widespread importance:

- *First.* What sort of analysis must lower courts make before concluding that the "comity" principle of *Fair Assessment* precludes federal court review?

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[5]E.g., *Noble v. Joint City-County Bd. of Tax Assessors* (11th Cir 1982) 672 F 2d 872; *Werch v. Town of Berlin* (7th Cir 1982) 673 F 2d 192.

[6]E.g., *Kunkel's Estate v. U.S.* (3d Cir 1982) 689 F 2d 408, 416, fn 7; *North American Cold Storage v. County of Cosle* (N.D. Ill 1982) 531 F Supp 1003, 1006.

- *Second.* What sort of state review procedures are adequate under *Fair Assessment* to preclude federal court review?[7]
- *Third.* Does the ability of a plaintiff to raise *federal* issues under the Civil Rights Act in *state* court automatically make *state* judicial procedures adequate under *Fair Assessment*?

THAT *STATE* COURTS HAVE CONCURRENT JURISDICTION TO DECIDE *FEDERAL* QUESTIONS DOES NOT MAKE *STATE* REMEDIES ADEQUATE TO OUST *FEDERAL* COURTS OF JURISDICTION

The Court of Appeals concluded that, because "California's state courts allow actions to vindicate federal rights under [42 USC] section 1983 . . .", state remedies are sufficient to oust federal courts of jurisdiction. (App A, pp A2-A3)

That cannot be. If that were the rule there would never be federal court review of state denials of civil rights, as there is (theoretically) *always* an adequate state remedy in *any* federal question case. With a few notable exceptions of exclusive federal jurisdiction, state courts generally have concurrent jurisdiction with federal courts to entertain federal questions. The Court of Appeals' conclusion would render the Civil Rights Act impotent.

This Court dealt with the issue extensively in *Patsy v. Florida Bd. of Regents* (1982) 457 US 496, 500, reaffirming the general rule that:

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[7]The plaintiffs in *Fair Assessment* did not contest the District Court's finding that state remedies were adequate. (*Fair Assessment*, 454 US at 116) Here, the inadequacy of the state scheme was the issue.

> "[W]hen federal claims are premised on [§1983] — as they are here — we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights" (Quoting with approval.)

In *Patsy*, this Court extensively reviewed the legislative history of the Civil Rights Act, concluding:

> "[T]he very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights — to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.' " (*Patsy*, 457 US at 503; quoting with approval.)

This Court gave three reasons for its conclusion, each of which shows the error in the Ninth Circuit's undue deference to the California judiciary:

> "First, in passing §1, Congress assigned to the federal courts a paramount role in protecting constitutional rights." (*Patsy*, 457 US at 503)

> "[Second.] A major factor motivating the expansion of federal jurisdiction through §§1 and 2 of the bill was the belief of the 1871 Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights." (*Patsy*, 457 US at 505)

> "A third feature of the debates relevant to the exhaustion question is the fact that many

> legislators interpreted the bill to provide dual or concurrent forums in the state and federal system, *enabling the plaintiff to choose the forum* in which to seek relief. *Cf. Monroe v. Pape,* 365 US 167, 183, 5 L Ed 2d 492, 81 S Ct 473 (1961) ('[T]he federal remedy is supplementary to *the state remedy,* and the latter, *need not be first sought* and refused before the federal one is invoked.' " (*Patsy,* 457 US at 506; emphasis added.)

The Ninth Circuit's conclusion that the Millers' ability to bring a Civil Rights suit in *state* court provided an adequate *state* remedy flies in the face of this Court's considered analysis in *Patsy.* If allowed to stand, the Ninth Circuit's holding will remove the ability of federal District Courts to redress Constitutional violations. In large measure, it will repeal the Civil Rights Act. The Ninth Circuit's holding will give every state and local government agency and employee a judicial weapon to prevent federal court review for those denied civil rights.

PROSECUTING A FEDERAL CIVIL RIGHTS ACTION REGARDING PROPERTY RIGHTS IN CALIFORNIA COURTS IS NO REMEDY

There is no gentle way to say this: California courts do not enforce federal Constitutional law in federal Civil Rights Act cases dealing with *property* rights.

This Court is, of course, aware that California has embarked on its own peculiar course with respect to the protection of property rights. California has held that, regardless of its severity or impact on the property owner, *no* government regulation can *ever* give rise to a Constitutional cause of action for damages in inverse condemnation. (*Agins v. City of Tiburon* [1979] 24 Cal 3d 266. aff'd on other grounds [1980] 447 US 255) In

San Diego Gas & Elec. Co. v. City of San Diego (1981) 450 US 621 Justice Brennan, speaking for at least four members of this Court,[8] concluded that California's no damages position ". . . flatly contradicts clear precedents of this Court." (*San Diego,* 450 US at 647; Brennan, J., dissenting)[9]

When a property owner brings a federal Civil Rights Act suit in California's courts, he is told that California's judiciary will apply *California* law, even though it conflicts with paramount federal law. As one California court put it:

> "The Gillilands in their brief concede that they have no remedy at law under these circumstances by virtue of the legal principles

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[8]Justice Rehnquist, writing separately, expressed general agreement with the substantive position of the four dissenters. (450 US at 633-634; Rehnquist, J., concurring)

[9]Because of Justice Rehnquist's concurring opinion, lower courts (both state and federal) have generally viewed Justice Brennan's dissent as representing this Court's substantive views. (*Hernandez v. City of Lafayette* [5th Cir 1981] 643 F 2d 118, 1199-1200; *Hamilton Bank v. Williamson County Reg. Plan. Comm'n* [6th Cir 1981] 643 F 2d 402, 408, rev'd on other grounds sub nom. *Williamson County Reg. Plan. Comm'n v. Hamilton Bank* [1985] ___ US ___, 86 L Ed 2d 126; *U.S. v. Riverside Bayview Homes, Inc.* [6th Cir 1984] 729 F 2d 391, 398; *Devines v. Maier* [7th Cir 1981] 665 F 2d 138, 152; *Barbian v. Panagis* [7th Cir 1982] 694 F 2d 476, 482, fn 5; *In re Aircrash in Bali* [9th Cir 1982] 684 F 2d 1301, 1311, fn 7; *Martino v. Santa Clara Valley Water Dist.* [9th Cir 1983] 703 F 2d 1141, 1147; *Fountain v. Metro Atlanta Rapid Transit Authority* [11th Cir 1982] 678 F 2d 1038, 1043; *Burrows v. City of Keene* [NH 1981] 432 A 2d 15, 20; *Pratt v. State* [Minn 1981] 309 NW 2d 767, 774; *Ripley v. City of Lincoln* [ND 1983] 330 NW 2d 505, 510; *Zinn v. State* [Wis 1983] 334 NW 2d 67, 72; *Kinzli v. City of Santa Cruz* [ND Cal 1982] 539 F Supp 887, 896; *Sheerr v. Township of Evesham* [NJ Super 1982] 445 A 2d 46. But see *Citadel Corp. v. Puerto Rico Highway Auth.* [1st Cir 1982] 695 F 2d 31, 33, fn 4.)

> enumerated in *Agins* which limit their remedies. They have, therefore, sought to set forth a claim for damages under the federal Civil Rights Act (42 U.S.C. §1983). That statute, in substance, merely establishes that a remedy is available when any person, under color of state law, deprives the complaining party of rights, privileges, or immunities secured by federal law. *The right to just compensation* for a govermental taking of private property *arises* not from the federal Civil Rights Act but from the *protections of the Fifth and Fourteenth Amendments. However, the California Supreme Court in Agins held that monetary damages constituted an inappropriate remedy* for an alleged taking which was the result of a local land-use regulation expressing concern with the chilling effect such awards might have on the proper exercise of the police power. (*Agins v. City of Tiburon, supra,* 24 Cal. 3d 266, 276-277.) *In view of that decision, the remedy of monetary damages would be unavailable* in any event, whether the action were brought in inverse condemnation or *under the federal Civil Rights Act."* (*Gilliland v. County of Los Angeles* [1981] 126 Cal App 3d 610, 617; emphasis added.)

For a property owner to file a federal Civil Rights Act case in California's courts is no remedy. It is an idle act which costs the already wronged citizen time and money to no benefit.

THE COMITY CONCEPT IN TAX CASES

Three times in recent years this Court has addressed the concept of comity in tax cases: *Rosewell v. LaSalle*

National Bank (1981) 450 US 503; *Fair Assessment in Real Estate v. McNary* (1981) 454 US 100; *California v. Grace Brethren Church* (1982) 457 US 393.

In each case, this Court affirmed that comity and due regard for the sovereignty of the several states warrant general nonintervention by federal courts in State taxation schemes. In each case, the justification for this general policy of nonintervention was expressed by quoting all or part of the following passage from Justice Brennan's concurring and dissenting opinion in *Perez v. Ledesma* (1971) 401 US 82, 128, fn. 17:

> "The special reasons justifying the policy of federal noninterference with state tax collection are obvious. The procedures for *mass assessment and collection of state taxes* and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are

more properly heard in the state courts." (Emphasis added.)[10]

In each case, this Court likewise made clear that the general rule was subject to at least one significant exception: *if* the State procedures do *not* provide a plain, adequate, and complete remedy, then comity is *no* bar, and it is the duty of the federal courts to adjudicate questions properly brought before them:

> "Such taxpayers must seek protection of their federal rights by state remedies, *provided of course* that those remedies are plain, adequate, and complete, . . . " (*Fair Assessment,* 454 US at 116, emphasis added.)[11]

This Court emphasized that it is necessary for federal courts to decide cases which fail to meet these criteria:

> "This Court has not hesitated to declare a state refund provision inadequate to bar federal relief if the taxpayer's opportunity to raise his constitutional claims in the state proceedings is uncertain. In *Hillsborough v. Cromwell,* 326 US 620, 90 L Ed 358, 66 S Ct 445 (1946), the taxpayer could not raise his constitutional challenge in the administrative proceedings, and appeal to the state courts was discretionary with those courts. Consequently, because 'there [was] such uncertainty concerning the New Jersey remedy as to make it speculative,' *id.,* at 625, 90 L Ed 358, 66 S Ct 445, the Court held that the taxpayer could seek declaratory relief in federal court." (*Grace,* 457 US at 414)

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[10]See *Rosewell,* 450 US at 521, fn. 26; *Fair Assessment,* 454 US at 108, fn. 6; *Grace,* 457 US at 410.

[11]To the same effect, is *Grace,* 457 US at 411, quoting *Rosewell.*

Finally, this Court expressly left open the question of whether comity is at all involved if the complaint states a claim which requires no scrutiny of tax assessment practices, but is an attack on the facial Constitutionality of the scheme. (*Fair Assessment,* 454 US at 107, fn. 4)

Thus, in analyzing the impact of the comity concept in tax cases, it seems important to determine whether:

- the "tax" in question is the kind whose review in federal court would cause the sort of disruption decried in *Perez;*
- the complaint alleges possible loss of a federal right and attacks the assessment scheme on its face, requiring no scrutiny of particular tax assessment practices; and
- state law provides remedies which are plain, adequate, and complete.

The next sections of this Petition will address these issues and demonstrate the inapplicability of comity in the case at bench.

THIS 1911 ACT ASSESSMENT IS NOT THE KIND OF "TAX" WITH WHICH THE COMITY CONCEPT IS CONCERNED

In each of its recent decisions on tax comity non-intervention, this Court was concerned with broad-based taxes: county-wide real property tax (*Rosewell; Fair Assessment*); state-wide unemployment insurance tax (*Grace*). See also: *Noble v. Joint City-County Bd. of Tax Assessors* (11th Cir 1982) 672 F 2d 872 [county-wide real property tax]; *Werch v. City of Berlin* (7th Cir 1982) 673 F 2d 192 [city-wide personal property tax]; *Hawaiian Telephone Co. v. State Dept. of Labor*

(9th Cir 1982) 691 F 2d 905 [state-wide unemployment insurance tax].

It was in that context that this Court announced its general rule of comity nonintervention. Challenge to such broad-based taxes plainly has the potential to throw state tax collection and administration into disarray.

The situation here is different.

First. It is questionable whether this type of special assessment is a tax at all. As a California court recently expressed it:

> "Taxes are raised for the general revenue of the governmental entity to pay for a variety of public services. [Citation.] . . . A special assessment is charged to real property to pay for benefits that property has received from a local improvement and, strictly speaking, is not a tax at all. [Citation.]" (*County of Fresno v. Malmstrom* [1979] 94 CA 3d 974, 983-984)

Second. This is not a broad-based tax, either in terms of the area covered or the taxpayers affected. Nor is it a revenue raising device like the one in *Fair Assessment*. It is a local street-widening project involving only assessment to two property owners. The assessment is to be used solely for this project, and is made *after* the project is *completed*. Thus, for the District Court to entertain this challenge to the Constitutionality of the City's scheme to make the Millers pay their own just compensation would not entail the danger of disrupting the fiscal viability of the state or of any of its components.

This special assessment is not the kind of "tax" with which the comity concept is concerned.

THE 1911 ACT ASSESSMENT SCHEME IS FACIALLY INCAPABLE OF PROVIDING DUE PROCESS OF LAW AND GIVES THE PROPERTY OWNER NO PLAIN, ADEQUATE, AND COMPLETE REMEDY

Two issues are discussed in this section, as their analysis is interwoven:

First, in *Fair Assessment,* this Court left open the question of whether comity had any bearing on the challenge of a state tax scheme where the challenge requires no scrutiny of particular state allocation practices and the scheme is said to violate a federal Constitutional right. (See *Fair Assessment,* 454 US at 107, fn. 4.)

As this case does not require scrutiny of any particular tax allocation practice and the statutory framework is incapable of providing due process of law, the Millers believe this is an appropriate case in which to answer this Court's open question and exercise federal court jurisdiction to review federal unconstitutionality. (Compare *North American Cold Storage v. County of Cook* [ND Ill 1982] 531 F Supp 1003, 1006-1007.)[12]

Second, the statutory framework of the 1911 Act provides no plain, adequate, and complete remedy.

The 1911 Act Scheme

The complaint at bar alleges that the assessment district scheme invoked by the City denies not only Fifth

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[12]This Court seems implicitly to have answered the question in this fashion in *Mueller v. Allen* (1983) 463 US 388. There, the viability of a state tax scheme was adjudicated in federal court without question, as it involved the establishment clause of the First Amendment.

Amendment just compensation but also Fourteenth Amendment procedural due process of law.

In fact, the scheme has been legislatively designed and judicially enforced in such a way that a property owner cannot win a judicial challenge.

First. The 1911 Act is designed so that the conclusions of the city council are final, conclusive, and insulated from judicial review, even when a jury trial is Constitutionally called for. (See Streets & Hwys Code §5003, quoted at p 5-6. See also Streets & Hwys Code §§5221 and 5368, quoted in App E.)

The courts are expressly commanded *not* to invalidate any actions so long as *published—not actual—notice* has been given. (See Streets & Hwys Code §5369, quoted at p 6)

The California courts have routinely enforced these conclusions of finality, rendering ineffective any attempt to challenge a 1911 Act assessment district in court. (See *City of Baldwin Park v. Stoskus* [1972] 8 Cal 3d 563 [assessment lien cannot be considered as damage in the condemnation action]; *White v. County of San Diego* [1980] 26 Cal 3d 897 [assessment upheld]; *Cogan v. City of Los Angeles* [1973] 34 Cal App 3d 516 [assessment upheld]; *County of Fresno v. Malmstrom* [1979] 94 Cal App 3d 974 [assessment districts not limited by Proposition 13]; *Talbot v. Wake* [1977] 74 Cal App 3d 428 [upholding the 1911 Act procedures leading to foreclosure of an assessment lien]; *Nelson v. Oro Loma Sanitary Dist.* [1950] 101 Cal App 2d 349; *Mitchell v. Board of Trustees* [1930] 104 Cal App 225; *Cutting v. Vaughn* [1920] 182 Cal 151; *Garibaldi v. Daly City* [1944] 63 Cal App 2d 480.)[13]

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[13]The only contrary case under the 1911 Act is *Spring St. Co. v. City of Los Angeles* (1915) 170 Cal 24, a 70 year old case which

The only challenge recognized by the California judiciary is if the city council reached its determination based on fraud, and that's been recognized only in dictum. (E.g., *Cogan,* 34 Cal App 3d at 521.)

Second. The system is designed to ensure either "waiver" of defects in the proceedings, or conclusive finality of administrative decisions.

The seminal fact to keep in mind about the assessment scheme is that the assessment itself (i.e., the determination of the amount which each member of the assessment district must pay) is the *last* thing determined. Without cost information, no informed decision can be made. Notice, even if it were given, would be useless because the cost information is absent. Without that, no rational decision is possible.

Before the property owner knows how much he will be charged, the decision to proceed with the project has been made. That, by itself, is a scheme which de facto disables an affected person from knowing if it is financially wise or unwise to resist Events occur in the following sequence:

The city council proposes a resolution of intention to perform the work. (Streets & Hwys Code §5131)

Notice that the city council will consider a resolution of intention to perform the work is made *only by publication.* (Streets & Hwys Code §5133)

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the Supreme Court refused to apply in 1980. (See *White v. County of San Diego* [1980] 26 Cal 3d 897.)

The two California cases cited by the Court of Appeals (App A, p A2) (*Dawson v. Town of Los Altos Hills* [1976] 16 Cal 3d 676 and *Jeffery v. City of Salinas* [1965] 232 Cal App 2d 29) do *NOT* involve the *1911* Act. They involve the Municipal Improvement Act of *1913,* a statute so different from the 1911 Act, the California courts do not use cases interpreting one to help interpret the other. (See *Harrison v. Board of Supervisors* [1975] 44 Cal App 3d 852, 860, fn 1.)

After the resolution of intention is adopted, the property owners are notified (by mail[14] and posting on the street) of the fact that the resolution has *already* been adopted (Streets & Hwys Code §5190), and a hearing is being set for protests of the completed action. (Streets & Hwys Code §5193)[15]

The decision of the city council on any protests is " . . . final and conclusive . . ." (Streets & Hwys Code §5221)

The assessment district is formed, (Streets & Hwys Code §5180 et seq) and a contract is awarded for the work. (Pub Cont Code §20410 et seq)

Notice of the award of a contract is given *only by publication and recordation,* which ". . . shall constitute notice to all persons that all property within the boundaries of the proposed assessment district shall be assessed . . . to pay the costs of the improvement . . ." (Pub Cont Code §20420)

At this point, having only the theoretical notice given *by publication* that a contract has been let, the property owner has a scant 10 days to protest *any irregularity of the many proceedings* to date, otherwise the irregularities are waived (Pub Cont Code §§20431, 20432):

> "§20431. Notice of irregularity in proceedings
>
> "At any time within 10 days from the date of the first publication of the notice of award

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[14]Mandel Miller never received this notice.

[15]In *Armstrong v. Manzo* (1965) 380 US 545, 551-552, this Court noted the lack of due process in a scheme which permitted one party to obtain an order ex parte without notice and put the burden on his opponent of proving the order ought to be set aside. This scheme is no different.

> of the contract, any owner of, or other persons having any interest in, any lot or land liable to assessment, who claims that *any of the previous acts or proceedings* relating to the work are irregular, defective, erroneous or faulty, may file with the clerk a written notice specifying in what respect the said acts and proceedings are irregular, defective, erroneous or faulty. The notice shall state that it is made pursuant to this section." (Emphasis added.)
>
> "§20432. Waiver of objections
>
> "*All objections to any act or proceeding occurring prior to the time within which such objections are permitted to be filed in relation to the work,* not made in writing and in the manner and at the time specified, *shall be waived,* if the resolution of intention to do the work has been actually published, as provided in this division." (Emphasis added.)

At some point in the process, land is condemned. The property owner must decide whether to seek just compensation for the property being taken from him for the project. He must decide this *without* knowing the amount of his assessment, *but* realizing that the amount of his recovery (and the government's attorneys' and appraisers' fees in his condemnation action) will be *included* in the assessment and charged to himself and others assessed. (Streets & Hwys Code §§5023.1, 5024[1]) Thus he understands that the more he is compensated for his land, the larger his assessment will be.

After the property acquisition and project construction are completed, the assessment is determined. (Streets & Hwys Code §5360 et seq) This includes a city

bureaucrat's decision as to the value of "special benefits" (a deduction from just compensation), even though the determination of just compensation is solely a *judical* function. (*Monongahela Navigation Co. v. U.S.* [1893] 148 US 312, 327) Thus, the California scheme deprives the owner of his right to trial as to just compensation (i.e., special benefits).

An appeal may be made to the city council (Streets & Hwys Code §5366), but it deals only with the *amount* (all other unconstitutionality having been "cured" by the waiver provision of Pub Cont Code §20432, discussed above), and the decision of the city council is ". . . final and conclusive . . ." (Streets & Hwys Code §5368)[16]

Thus, the procedure established by the 1911 Act is designed to ensure that the city council can do as it wishes—absent actual fraud—with the determinative notices of its actions buried in the classified sections of newspapers. And if a property owner accidentally receives timely notice so he can protest, he is left to the mercy of the city council, whose decision is final and conclusive without judicial review.

The Ninth Circuit's conclusion that this statutory scheme provides remedies because the Millers may protest the assessment, appeal to the city council, and seek judicial review (App A, p A2) is a fantasy. It is not the system established by the 1911 Act.

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[16]As a practical matter, there will be little adjustment. The project has already been built. Its cost is fixed. Anything not charged to a protesting owner will have to be paid by another owner or the City's general fund. There is thus a built-in bias against reducing assessments, a bias rendered secure by the knowledge that there will be no judicial review.

The Scheme Is Unconstitutional

First. The critical notice provisions of the 1911 Act provide *only* for notice by publication or recordation. (Streets & Hwys Code §5133; Pub Cont Code §20420) Published notice validates all city actions. (Streets & Hwys Code §5369; Pub Cont Code §20432)

One would have thought it clear, at least since *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 US 306, that notice by publication is Constitutionally inadequate where a proposed action will affect an interest in life, liberty, or property.

If any doubt remained after *Mullane,* it was dispelled by this court in *Mennonite Board of Missions v. Adams* (1983) 462 US 791, ___, 77 L Ed 2d 180, 182:

> "Notice by mail or other means as certain to ensure actual notice is a *minimum constitutional precondition* . . . to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." (Initial emphasis added; final emphasis by the Court.)

Second. The unconstitutionality of the City's scheme to have the Millers pay their own just compensation by being assessed for a project which will seriously injure the subject property was established in *Norwood v. Baker* (1898) 172 US 269. Justice Harlan's statement of the issue and conclusion for the Court in *Norwood* aptly make the Millers' point:

> "This case arises out of the condemnation of certain lands for the purpose of opening a street in the village of Norwood, a municipal corporation in Hamilton county, Ohio.

> "The particular question presented for consideration involves the validity of an ordinance of that village, assessing upon the appellee's land abutting on each side of the new street an amount covering, not simply a sum equal to that paid for the land taken for the street, but, in addition, the costs and expenses connected with the condemnation proceedings." (172 US at 270-271)

> "But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. . . . [T]he guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvements, could not be questioned by him in the courts of the country." (172 US at 278-279)

Third. The idea that administrative agencies may do as they please without judicial review is repugnant to the most elementary notions of due process. As this Court expressed it in *St. Joseph Stock Yards Co. v. U.S.* (1936) 298 US 38, 51-52:

> "When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these [due process and just compensation] limits the power. The legislature cannot preclude that

> scrutiny of determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained . . . [T]o say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. . . . Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

Yet the conclusive, non-reviewability of legislative findings which this Court found repugnant in *St. Joseph* is *precisely* what the California Legislature has decreed in the 1911 Act, the California courts have routinely accepted, and the Ninth Circuit has now endorsed.

There Is No Plain, Adequate, And Complete State Remedy

The foregoing discussion makes this point: The scheme devised in the 1911 Act provides Constitutionally inadequate notice, grants the city council the sole power to provide a remedy, and insulates city council decisions from judicial review.

There is no remedy.

To be sure, following *Fair Assessment,* cases can be found which decline review of state taxation schemes.[17]

Yet, before declining review, each of those cases critically examined the remedies made available by the states and found the remedies plain, adequate, and complete. In none of those cases was a taxpayer run through a governmental meatgrinder designed to provide no notice at critical junctures and to endow government agencies with the sole (unreviewable) power to determine whether relief was to be provided. In each of those cases, judicial review was provided.

Here it is otherwise. There is no state remedy. Where there is no remedy, the District Court has jurisdiction even after *Fair Assessment.* (*North American Cold Storage v. County of Cook* [ND Ill 1982] 531 F Supp 1003, 1006-1007; *Kunkel's Estate v. U.S.* [3d Cir 1982] 689 F 2d 408, 416, fn. 7)

CONCLUSION

The City's assessment scheme is manifoldly violative of the Millers' Constitutional rights. The scheme gives no effective remedy in the state courts. It is designed and operated to produce "kangaroo" justice.

With respect, the opinion of the Court of Appeals fails to address the serious Constitutional issues at bench. It devotes but one paragraph in a one page published opinion to the availability of state remedies, and in that paragraph *assumes* (wrongly) that such remedies exist.

Serious issues are presented. Guidance from this Court is needed on the operation of the comity precept of *Fair*

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[17]E.g., *Noble v. Joint City-County Bd. of Tax Assessors* (11th Cir 1982) 672 F 2d 872; *Werch v. Town of Berlin* (7th Cir 1982) 673 F 2d 192; *Hawaiian Telephone Co. v. State Dept. of Labor* (9th Cir 1982) 691 F 2d 905.

Assessment. Beyond that, if the Civil Rights Act is to retain meaning, the Ninth Circuit's conclusion that all such cases be brought in state courts merits this Court's attention.

Petitioners pray that a writ issue.

Respectfully submitted,

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MICHAEL M. BERGER
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Attorneys for Petitioners
MILTON A. MILLER and MANDEL M. MILLER

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
MAR 22 1985
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

MILTON A. MILLER and MANDEL M. MILLER,

Plaintiffs-Appellants,

vs.

THE CITY OF LOS ANGELES, a municipal corporation,

Defendant-Appellee.

No. 83-5895
DC No. CV 83-0065-ER
OPINION

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued and submitted February 10, 1984

Before: TANG, SKOPIL, and POOLE, Circuit Judges

SKOPIL, Circuit Judge:

The Millers own property on the east side of Colfax Avenue, a street which the City of Los Angeles seeks to widen. The City has filed a condemnation action to take the front 20 feet of the Millers' property. The Millers are part of an assessment district and will be charged an amount commensurate with their benefit from the street widening pursuant to the Improvement Act of 1911 (California Streets and Highways Code § 5000 et seq.).

The Millers filed an action under 42 U.S.C. § 1983 in the district court claiming that the City's assessment is an unconstitutional taking. The district court dismissed the action for lack of jurisdiction. We affirm.

APPENDIX A

The district court's decision on subject matter jurisdiction is reviewed *de novo. Clayton v. Republic Airlines, Inc.,* 716 F.2d 729, 730 (9th Cir. 1983). Taxpayers are barred by the principle of comity from asserting section 1983 actions against the validity of state tax systems in federal court. *Fair Assessment in Real Estate Ass'n v. McNary,* 454 U.S. 100, 116 (1981). If the state remedies available to the taxpayer are "plain, adequate, and complete," then the taxpayer is precluded from bringing an original action challenging the tax in federal court. *Id.* The state remedies are plain, adequate, and complete if they provide the taxpayer with a full hearing and judicial determination at which the taxpayer may raise any federal constitutional objections to the tax. *Rosewell v. LaSalle National Bank,* 450 U.S. 503, 514 (1981).

The power to create special assessment districts to pay the cost of street improvements is a "legislative process grounded in the taxing power of the sovereign." *Dawson v. Town of Los Altos Hills,* 16 Cal. 3d 676, 683 (1976). *See Rust v. Johnson,* 597 F.2d 174, 177 (9th Cir.), *cert. denied,* 444 U.S. 964 (1979). The *McNary* principle of comity, therefore, applies to this peculiarly local and state form of taxation.

The Millers have sufficient state remedies. They may protest the proposed assessment within the City's legislative body. California Streets and Highways Code § 5220-5227. If the assessment is established over their objections, they may appeal to the legislative body contesting the amount of assessment. California Streets and Highway Code § 5360-5367. In the event of an adverse decision, the Millers may seek review in state court. *See Dawson,* 16 Cal. 3d at 683-85; *Jeffrey v. City of Salinas,* 42 Cal. Rptr. 486, 491 (1965). California's state courts allow actions to vindicate federal rights

under section 1983. *Martinez v. California,* 444 U.S. 277, 283-84, n.7 (1980); *Williams v. Horvath,* 16 Cal. 3d 834 (1976). The state remedies available to the Millers preclude them from seeking review of their special assessment in federal court.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUN 25 1985
PHILLIP B. [illegible]RRY
CLERK, U.S. COURT OF APPEALS

MILTON A. MILLER and MANDEL M. MILLER,

Appellants,

v.

THE CITY OF LOS ANGELES, a municipal corporation,

Appellee.

No. 83-5895
DC No. DV 83-0065-ER
ORDER

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Before: TANG, SKOPIL, and POOLE, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MILTON A. MILLER and MANDEL M. MILLER,

Plaintiffs,

v.

THE CITY OF LOS ANGELES, a municipal corporation; HOWARD FINN, JOEL WACHS, JOY PICUS, JOHN FERRARO, ZEV YAROSLAVSKY, PAT RUSSELL, ERNANI BERNARDI, ROBERT FARRELL, GILBERT W. LINSAY, DAVIS S. CUNNINGHAM, MARVIN BRAUDE, HAL BERNSON, PEGGY STEVENSON, ARTHUR K. SNYDER, and JOAN M. FLORES, individually and as members of the Los Angeles City Council,

Defendants.

FILED
MAR 14 1983
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORN'
CBC

NO. CV 83-0065-ER

MEMORANDUM DECISION AND ORDER OF DISMISSAL

This case is presently before the Court on defendants' Motion to Dismiss the Complaint. At the close of the hearing on defendants' Motion on February 28, 1983, the Court indicated that it would deny the Motion. After reviewing once again the briefs submitted by the parties, and considering the oral argument of counsel, the Court has reconsidered that ruling and will instead grant the defendants' Motion to Dismiss for the reasons set forth below.

I

Plaintiffs are the owners of real property located on the east side of Colfax Avenue between Hartsook and Magnolia Avenues in the San Fernando Valley. This property is the subject of a condemnation action filed by the City in April, 1982, and is also within what is called an "assessment district" established by the City pursuant to the Improvement Act of 1911 (the "Act"). Plaintiffs are seeking damages for the alleged violation of their constitutional rights under 28 U.S.C. § 1983, claiming that the condemnation of their property and the ensuing "special assessment" levied thereon amount to a taking without just compensation. Specifically, plaintiffs contend that the assessment levied upon their property for "benefits" arising from the street improvements effectively denies them fair compensation for the taking of their land because the improvements in no way benefit the property. In fact, the plaintiffs allege that the improvements are detrimental to their property.

Defendants have moved to dismiss the complaint. Defendants contend that the special assessment procedure is a type of state tax system, and that federal courts are barred, under the principle of comity, from adjudicating the validity or application of a state tax system.

II

In *Fair Assessment in Real Estate Association v. McNary,* 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981), the Supreme Court issued a landmark decision concerning the rights of taxpayers to bring civil rights actions attacking the validity or application of a state tax system in federal court. In that case, petitioners filed suit for damages against certain county officials alleging that the administration of the property tax system had

deprived them of equal protection and due process of law by unequal taxation of real property. The Court noted at the outset that to award damages in this context would require a federal court's declaration that the state had violated petitioner's constitutional rights in administering the state tax system.

First, the Court considered Congress' intent when it adopted the Tax Injunction Act, 28 U.S.C. § 1341.[1] The Court found that Congress "recognized that the autonomy and fiscal stability of the States survive best when state tax systems are not subject to scrutiny in federal courts." *Id.* at 102-103. Thus, the prohibition on federal courts from "enjoining or restraining" state tax systems reflected the fundamental principle of comity that "is essential to 'Our Federalism'." *Id.* The Court determined that these broad principles of comity predated the Tax Injunction Act, and were in no way restricted by its passage.

The Court concluded that damage actions under § 1983 are equally disruptive to state tax systems, and thus held that taxpayers are barred, under principles of comity, from asserting § 1983 actions attacking the validity of state tax systems in federal court. The Court held that the state taxpayers are required to seek protection of their federal rights by state remedies, provided that those remedies are plain, adequate and complete.

The parties have couched the issue in the case at bar as whether the special assessments made pursuant to the Act are part of a state tax system, thereby bringing them within the holding of the *Fair Assessment* decision. This issue cannot, and should not, be resolved through semantic distinctions. Instead, the Court must consider the true nature of these special assessment plans and

determine if the broad principles of comity require abstention by the federal courts.

From a constitutional perspective, the California Supreme Court has repeatedly recognized that "the establishment of a special assessment district takes place as a result of a peculiarly legislative process grounded in the taxing power of the sovereign." *Dawson v. Town of Los Altos Hills,* 16 Cal.3d 676, 683-684 (1976). *See also, City of Baldwin Park v. Stoskus,* 8 Cal.3d 563, 568 (1973) (a special assessment is a function of the taxing power); *Emery v. Bradford,* 29 Cal. 75, 84 (1865) (assessment is levied on the adjoining land by virtue of the sovereign power of taxation; *Cogan v. City of Los Angeles,* 34 Cal.App.3d 516, 520 (1973) (a special assessment is levied under the power of taxation). The Ninth Circuit has recently concurred in this position in *Rust v. Johnson,* 597 F.2d 174 (9th Cir. 1979). Citing the California case of *City of Baldwin Park, supra,* the Court noted that the city is authorized, under the Streets and Highways Code, to "order improvements, *make assessments,* issue bonds. . . . These functions are performed pursuant to the *taxing power* of the governmental purpose of providing for such improvements as the public interest of convenience may require." *Rust, supra,* at 177 (emphasis added).

Plaintiffs cite to a recent California case which states that "a special assessment is . . . strictly speaking, not a tax at all." *County of Fresno v. Malmstrom,* 94 Cal.App.3d 974, 983-984 (1979). In that case, the court set out various differences between "taxes" and "special assessments" and held that special assessments are not taxes *for purposes* of a particular constitutional provision dealing with "special taxes."[2] It is true, that special assessments have characteristics distinct from those found in normal "taxes".[3] However, the court in

County of Fresno was not faced with the comity issue, and considerations in this regard vary markedly from those which will control in a case involving statutory construction.

Thus, although special assessments have characteristics that distinguish them from normal taxes, this method of providing for highway improvements is truly a "tax system" in that it is inextricably intertwined with the fiscal policies of the state, and the administration of the improvements program. The importance of the system as a revenue raising device is described in *County of Fresno, supra,* at 978:

> For over 60 years, [the Improvement Act of 1911 and the Municipal Improvements Act of 1913] have provided the most widely used procedure in California for the construction of a variety of public improvements . . . ; property owners benefited by the improvements pay for these improvements either in cash or, at their option, by installments over a period of time . . . . [A]lmost $15.5 million in streets, sewers, drains and incidental facilities were constructed in the three and one-half years ending December 31, 1978; almost half of the funding for these projects was paid by assessment procedures under these acts . . . .

Thus, constitutional challenges to the assessment procedures adopted under the Act could have a profound impact on the financing of state government.

Regardless of the label attached to the assessment process, the precise concerns that led to the *Fair Assessment* decision necessarily arise in this context. Loss of funding from the assessments made under the Act would have a definitie impact on the entire state

tax system. This Court is guided by the principles of comity set forth by the Supreme Court in *Fair Assessment,* and will abstain from exercising jurisdiction over a matter that would undoubtedly have a significant affect on the state fiscal policies.[4] To award the plaintiffs damages under § 1983 necessitates a finding that the administration of the special assessment program is unconstitutional, and such interference would be "contrary to 'the scrupulous regard for the rightful independence of the state governments which should at all times actuate the federal courts'." *Fair Assessment, supra* at 116, quoting *Matthews v. Rodgers,* 284 U.S. 521, 525, 52 S.Ct. 217, 70 L.Ed. 447 (1932).

It is, therefore, ORDERED that defendants' Motion is granted and plaintiffs' action is hereby DISMISSED.

DATED: March 14, 1983.

EDWARD RAFEEDIE
United States District Judge

FOOTNOTES

[1]28 U.S.C. § 1341 provides:

> The district courts shall not enjoin, suspend or restrian the assessment, levy or collection of any tax under State law, where a plain, speedy and efficient remedy may be had in the courts of such state.

[2]In *County of Fresno,* the issue was the applicability of certain provisions of the California Tax Limitation Initiative to the issuance of bonds pursuant to the Improvements Act of 1911.

[3]Differences include, (1) a special assessment can only be levied on land; (2) a special assessment cannot ordinarily be made a personal liability; (3) the special assessment is usually based wholly on benefits received; and (4) the special assessment is exceptional as to both time and locality. *See* County of Placer v. Corin, 113 Cal.App.3d 445, 450 n.4 (1980)

[4]The Court notes that independent of the comity principles arising from the *Fair Assessment* decision, this case presents a strong argument in favor of abstention pursuant to the Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed.971 (1941). The issues before this Court are presently before the state court in two separate proceedings, and the resolution therein may avoid the need for federal intervention in to sensitive areas of state policy.

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CITY OF LOS ANGELES

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MILTON A. MILLER and MANDEL M. MILLER, Plaintiffs, v. THE CITY OF LOS ANGELES, a municipal corporation, et al., Defendants.	NO. 83-0065 ER (Kx) ORDER RE MOTION TO RECONSIDER ORDER OF DISMISSAL

The plaintiffs' Motion to Reconsider Order of Dismissal came on regularly for hearing on May 9, 1983.

The Court after reading and considering the moving and opposing papers and argument of counsel,

ORDERED:

1. That the plaintiffs' Motion to Reconsider the Order of Dismissal entered in the docket on March 17, 1983, is DENIED; and

2. That the Memo Decision and Order of Dismissal entered in the docket on March 17, 1983, is hereby

amended to show that the Court considered the adequacy of remedies available to the plaintiffs under the laws of the State of California, and found that those remedies are plain, adequate and complete.

_____

EDWARD RAFEEDIE
U.S. DISTRICT JUDGE

APPROVED AS TO FORM:

FADEM, BERGER & NORTON

By _____

JERROLD A. FADEM

STREETS AND HIGHWAYS CODE

§ 5000. Title of division

This division may be cited as the Improvement Act of 1911.

§ 5003. Liberal construction; effect of irregularities in procedure; exclusive remedy

This division shall be liberally construed in order to effectuate its purposes. No error, irregularity, informality, and no neglect or omission of any officer, in any procedure taken under this division, which does not directly affect the jurisdiction of the legislative body to order the work or improvement, shall avoid or invalidate such proceeding or any assessment for the cost of work done thereunder. The exclusive remedy of any person affected or aggrieved thereby shall be by appeal to the legislative body in accordance with the provisions of this division.

§ 5023.1 Acquisition; acquisition cost

"Acquisition" shall mean and include any acquisition necessary or appropriate in connection with any work or improvement authorized to be made under Section 5101 of this code, by gift, purchase, or eminent domain proceedings limited however to the following:

(a) Land, rights-of-way or easements.

(b) Sewage disposal facilities or capacity in or right to use sewage disposal facilities.

(c) Drainage systems or facilities or capacity in or right to use drainage systems or facilities.

(d) The payment in full of all amounts necessary to eliminate any fixed special assessment liens previously imposed upon any assessment parcel included in the new

assessment district. The cost of such payment shall be included in the new assessment on such parcel. This subdivision shall be applicable only in cases where such acquisition is incidental to other acquisitions or improvements.

"Acquisition cost" or words of similar import when used in this division shall be deemed to include all incidental expenses in connection with such acquisition.

§ 5024. Incidental expenses

"Incidental expense" includes *all of the following:*

(a) The compensation of the engineer for work done by him, and attorney's fees for services in proceedings pursuant to this division.

(b) The cost of printing and advertising provided for in this division, including the treasurer's estimated cost of printing, servicing, and collecting any bonds to be issued to represent or be secured by unpaid assessments.

(c) The compensation of the person appointed by the superintendent of streets to take charge of, and superintend any of, the work.

(d) The expenses of making the assessment, and of the collection of assessments *by the superintendent of streets when directed by ordinance to receive payments* pursuant to Section 5396, and of preparing and typing the resolutions, * * * notices, and other papers and proceedings for any work authorized by this division.

(e) The expenses of making any analysis and tests to determine that the work, and any materials or appliances incorporated therein, comply with the specifications.

(f) All costs and expenses incurred in carrying out the investigations and making the reports required by

the provisions of the Special Assessment Investigation, Limitation and Majority Protest Act of 1931 (*Division 4 (commencing with Section 2800)).*

(g) The cost of title searching, description writing, salaries of right-of-way agent, appraisal fees, partial reconveyance fees, surveys, and sketches incident to securing rights-of-way for any work authorized by this division.

(h) Any other expenses incidental to the construction, completion, and inspection of the work in the manner provided for in this division.

(i) The cost of relocating or altering any public utility facilities as required by the improvement in those cases where such cost is the legal obligation of the city.

(j) In a county having a population of 4,000,000 or over, the cost of purchasing plans prepared by a registered civil engineer engaged by owners.

(k) The cost of filing and of recording documents where such cost is the legal obligation of the city.

(l) The cost of any acquisition, as defined in Section 5023.1 * * *, and expenses incidental in connection with such acquisition. * * *

(m) In the event that the construction of sewers or appurtenances incident thereto shall have been ordered, sewer service, *connection, and capacity* charges established by the city as a condition to the providing of sewer service for the benefit of properties within the assessment district, and required for the completion and utilization of the improvement constructed.

(n) *In the event that the construction of water improvements or appurtenances incident thereto shall have been ordered, water service, connection, and capacity charges established by the city as a condition*

to the providing of water service for the benefit of properties within the assessment district, and required for the completion and utilization of the improvement constructed.

All demands for incidental expenses shall be presented to the street superintendent, by an itemized bill, duly verified by the demandant.

§ 5050. Compliance with provisions of part

Unless the particular provision or the context otherwise requires, whenever a notice, resolution, order or other matter is required to be published or posted by this division it shall be published or posted in accordance with the provisions of this part.

§ 5051. Person to give notice; effect of noncompliance

Whenever any notice, resolution, order, or other matter is required to be published or posted, and the duty of posting or publishing, or procuring the same is not specifically enjoined upon any officer or person, the clerk shall post or procure the publication or posting thereof, as the case may be.

No step in any proceeding shall be invalidated or affected by any error or mistake or departure from the provisions of this section as to the officer or person posting or publishing, or procuring the publication or posting, of any notice, resolution, order or other matter when the same is actually published or posted for the time required.

§ 5052. Requirement of notice

No notice, nor any publication of any notice, order, resolution or other matter, other than that expressly provided for in this part or elsewhere in this division

shall be necessary to give validity to any of the proceedings provided for in this division.

§ 5060. Inapplicability of other law

No other law of this State shall govern or be applicable to any publication provided for in this division, nor shall the provisions of Title 1, Division 7, Chapter 1 of the Government Code[1] have any application to any publication provided for in this division.

§ 5061. Manner of publication; posting in lieu of publication

Whenever in this division a notice, resolution, order or other matter is required to be published and the manner of such publication is not specified, it shall be published in a daily, semiweekly or weekly newspaper published and circulated in the city conducting the proceedings and which is selected by the legislative body for that purpose, or by the clerk or other officer issuing the notice or responsible for the publication where the legislative body has not selected any newspaper for that purpose.

If there is no daily, semiweekly or weekly newspaper published and circulated in the city, and if the city conducting the proceedings is not a county, the notice, resolution, order or other matter required to be published shall be published in some newspaper published in the county in which such city is located.

If the city conducting the proceedings is not a county and there is no newspaper published in the city or in the county in which such city is located, the notice, resolution, order or other matter required to be published shall be posted and kept posed for the same length of time required for the publication of the same in a newspaper, in three public places in the city.

§ 5062. Time of publication

Whenever in this division a notice, resolution, order or other matter is required to be published, and the time for such publication is not specified, it shall be published in two entire issues of the newspaper, one being on one day and the other issue being on a subsequent day of the same or a subsequent week.

§ 5063. Proof of publication

Proof of the publication or posting of any notice, resolution, order or other matter in accordance with any of the provisions of this division may be made by affidavit of:

(a) The owner, publisher, printer, foreman or clerk of the newspaper in which the publication was made.

(b) The poster of the notice.

(c) A person having knowledge of the facts.

§ 5065. Time and place of posting

Whenever in this division notice is required to be given by posting and the time or method for such posting is not specified, the clerk shall conspicuously post the notice on or near the door of the council chamber for not less than five days.

§ 5070. Method; time

Whenever in this division notice is required to be given by mail and the time or method for mailing is not specified, the notice shall be given by mail as follows:

(a) The legislative body shall direct the clerk to mail the notice, postage prepaid, to all persons owning real property which is proposed to be assessed to pay any part of the cost of the work, whose names and addresses appear on the last equalized assessment roll or as known

to the clerk. If property assessed by the State under Section 14 of Article XIII of the Constitution is proposed to be assessed, such notice shall be mailed to every owner of such property at the address thereof shown on the last board roll transmitted to the county auditor.

(b) If the notice is a notice of a hearing, it shall be mailed at least 15 days prior to the date fixed for that hearing.

§ 5071. Proof of mailing

The clerk shall upon the completion of the mailing of the notice file with the legislative body an affidavit setting forth the time and manner of the compliance with the requirements of this chapter.

§ 5072. Effect of error

The failure of the clerk to mail any notice or the failure of any person to receive the same shall not affect in any way whatsoever the validity of any proceedings taken under this division, nor prevent the legislative body from proceeding with any hearing so noticed.

§ 5131. Resolution of intention; description of work

Before ordering any work done which is authorized by this division, the legislative body shall pass a resolution of intention to do so, referring to the street by its lawful or official name, or the name by which it is commonly known. If the work is not to be done upon a public street or public way, then by briefly describing the property or right of way on which it is to be constructed, and briefly describing the work.

§5132. Contents of resolution; necessity for hearing; notice; time

The resolution of intention shall be sufficient if it states in general terms the class or kinds of work contemplated,

such as grading, paving, sewering and other work, and gives in general the location of the proposed work and refers to plans, profiles, detailed drawings and specifications or such of them as may be suitable or proper for the full and detailed description of the proposed work, and if it refers to any agreement entered into pursuant to Section 5103. The resolution of intention shall contain also a notice of the day, hour and place when and where any and all persons having any objections to the proposed work or work and acquisition may appear before the legislative body and show cause why the proposed work or work and acquisition should not be carried out in accordance with the resolution of intention.

* * * *The notice shall also contain the name and telephone number of a local department or agency designated by the legislative body to answer inquiries regarding the hearing proceedings. Such* notice shall be omitted if the hearing of objections is not required as provided hereunder. The hearing of objections shall not be less than 15 nor more than 60 days from the date of the passage of the resolution.

The hearing of objections shall not be required if the legislative body, when considering passage of the resolution of intention, finds and determines by a four-fifth's vote of all members thereof, that all of the owners of lots or lands liable to be assessed, or their agents, who shall make oath that they are such agents, have signed and filed a petition waiving * * * *the* hearing, with the clerk, on or before the fifth day prior to the day that the resolution of intention is to be considered for passage, declaring that they do not have any objections to the proposed work or work and acquisition, the extent of the district to be assessed, or any agreement entered into pursuant to Section 5103 or any other

objections, and requesting that the hearing of objections shall not be required.

The intention of the legislative body to enter into an agreement with any other public agency, or public utility, pursuant to the provisons of Chapter 5 (commencing with Section 5170) or Chapter 28 (commencing with Section 5896.1) of this part, shall be briefly stated in the resolution of intention.

§ 5133. Publication of resolution

The clerk shall cause the resolution of intention to be published. The first publication shall be made not less than 10 days prior to the date of public hearing stated in said resolution. If the hearing of objections is not required, the first publication shall be within 10 days after the date of passage of the resolution.

§ 5180. Power to create district; territory

The legislative body shall make the expense of such work chargeable upon a district, which the legislative body shall, in its resolution of intention, declare to be the district benefited by the work, and to be assessed to pay the cost and expense thereof. The territory comprising said district may, but need not, include all, or be confined to, or extend beyond, the lots or lands fronting upon the improvement, or be contiguous, and the district may consist of separate and distinct areas or sections. The work performed in one section need not benefit the other section or sections.

§ 5190. Notice of adoption of resolution; posting

After the adoption of the resolution of intention, the street superintendent shall cause to be conspicuously posted along the line of the contemplated work, at not more than 300 feet in distance apart, but not less than three in all, notices of the passage of the resolution.

§5191. Place of posting

Copies of the notice shall also be posted on all the open streets within the district at not more than 300 feet in distance apart on each street so posted, but no proceeding shall ever be held invalid for failure to post any street if this section has been substantially complied with.

§ 5192. Time for completion of posting

In every case all posting must be fully completed at least 10 days before the day set for hearing protests or objections.

§ 5193. Contents of notice

The notices shall be headed "Notice of Improvement" in letters of not less than one inch in height; and shall in legible characters state the fact of the passage of the resolution of intention, its date, and briefly, the work proposed, an estimate of the total cost of the proposed work, the amount of any contribution of work or labor and any portion of materials, supplies or equipment which is to be made by any local, state or national agency or authority, and refer to the resolution of intention for further particulars. The notices shall contain also a statement of the day, hour and place when and where any and all persons having any objections to the proposed work may appear before the legislative body and show cause why the proposed work should not be carried out in accordance with the resolution.

§ 5193.1 Reference to acquisition in notice; estimate of cost

In the event that the proceedings include an acquisition, said notices shall make reference to such acquisition and shall set forth the estimate of the csot of such acquisition.

§ 5194. Mail notice of adoption of resolution

The legislative body shall direct the clerk to and he shall give notice by mail of the adoption of the resolution of intention.

§ 5195. Contents of mail notice

The notice shall contain a statement of the time, place and purpose of the hearing on the resolution of intention and a statement of the total estimated cost of the proposed improvement, the amount of any contribution of work or labor and any portion of materials, supplies or equipment which is to be made by any local, state or * * * *federal* agency or authority, together with a statement that any person interested may file a protest as provided in this division. *The notice shall also contain the name and telephone number of a local department or agency designated by the legislative body to answer inquiries regarding the protest proceedings.*

§ 5196. Notice to railroads; effect of failure to give

If the doing of the work requires a change of grade of any railroad track or tracks, the legislative body shall direct the clerk to mail to the owner or reputed owner or operator or reputed operator thereof, at its last known aaddress as the same appears on the tax rolls of the city, the legislative body of which is conducting the proceeding, or when no address so appears then to such owner or operator in care of general delivery in such city and to the Public Utilities Commission, printed copies of the resolution of intention within five days after the first publication thereof. Failure to mail said copies or failure of any such owner or operator to receive the same or any erroneous address thereon shall not affect the jurisdiction of the legislative body, but in such event the failure of the owner or operator of such tracks

to make objection to the proposed grades shall not be deemed to be a waiver of all objections to the proposed grades or proposed change or modification of grade, nor operate as a bar to any claim for damages, if recoverable damages there be.

§ 5197. Copy of resolution of intention as alternative to notices

As an alternative to the form and contents of the notices prescribed in Sections 5193 and 5195 hereof, said notices may consist of copies of the resolution of intention; provided, that said resolution contains an estimate of the total cost of the proposed work. Copies of the resolution of intention to be posted shall be headed "Notice of Improvement" in letters of not less than one inch in height.

§ 5198. Chapter inapplicable if hearing of objections not required

This chapter shall not apply if the hearing of objections is not required pursuant to Section 5132.

§ 5220. Protests

At any time not later than the hour set for hearing objections to the proposed work, any owner of property liable to be assessed for the work may make written protest against the proposed work or against the extent of the district to be assessed, or against any agreement entered into pursuant to Section 5103, or any of them. Such protest must be in writing, must contain a description of the property in which each signer thereof is interested, sufficient to identify the same and, if the signers are not shown on the last equalized assessment roll as the owners of such property, must contain or be accompanied by written evidence that such signers are the owners of such property. All such protests shall

be delivered to the clerk, and no other protests or objections shall be considered.

§ 5221. Hearing; adjournment; withdrawal of protest

At the time set for hearing protests the legislative body shall proceed to hear and pass upon all protests so made as required by Section 5220 and its decision shall be final and conclusive. The legislative body may adjourn the hearings from time to time. Any such protest may be withdrawn by the owner making the same, in writing, at any time prior to the conclusion of said protest hearing or any such adjournment thereof.

§ 5341. Diagram of property affected

The engineer shall prior to completion of the contract make a diagram of the property affected or benefited by the proposed work, as described in the resolution of intention, which is to be assessed to pay the costs and expenses thereof.

§ 5342. Contents of diagram; approval by legislative body

The diagram shall show each separate lot or parcel of land within the limits of the assessment district, and the dimensions of each such lot or parcel of land and the relative location of the same to the work proposed to be done.

§ 5343. Assessment according to benefit

Immediately after its completion the diagram shall be delivered to the superintendent of streets, who shall immediately, after the contractor has fulfilled his contract to the satisfaction of the superintendent of streets or the legislative body, on appeal, proceed to estimate upon the lots or parcels of land within the assessment district, as shown by the diagram, the benefits arising from such work, and to be received by each such

lot or parcel of land. He shall thereupon assess upon and against the lands in the assessment district the total amount of the costs and expenses of such work, and in so doing shall assess the total sum upon the several lots or parcels of land in the assessment district, benefited thereby, in proportion to the estimated benefits to be received by each of the said several lots or parcels of land.

§ 5360. Assessment; amount

After the contractor has fulfilled his contract to the satisfaction of the street superintendent, or the engineer if such power has been delegated to him, the superintendent or engineer, as the case may be, shall forthwith make an assessment to cover the sum due for the work performed and specified in the contract, including all incidental expenses, in conformity with the provisions of this part according to the character of the work done, and in the event an acquisition is included in the proceeding, including the amount then estimated by the street superintendent or engineer as the case may be, as the cost of the acquisition.

§ 5362. Filing of assessment; notice; date of hearing; posting; publication

The assessment shall be filed with the clerk. The clerk shall give notice of the filing of the assessment and of a time to be therein fixed by the clerk when all persons interested in the work done or in the assessment will be heard by the legislative body. The notice shall be posted and in addition be published. The first publication shall be not less than 15 days before the time fixed for the hearing.

§ 5363. Mail notice

Such notice shall also be given by mail.

§ 5366. Appeal to legislative body

The owners, the contractor, or his assigns, and all other persons interested in any work done under this division, or in the assessment, feeling aggrieved by any act or determination of the superintendent of streets or engineer in relation thereto, or who claim that the work has not been performed according to the contract in a good and substantial manner or who claim that any portion of the work for any reason was omitted or illegally included in the contract or having or making any objection to the correctness of the assessment or diagram or other act, determination or proceedings of the superintendent of streets or engineer, shall prior to the day fixed for the hearing upon the assessment appeal to the legislative body by briefly stating in writing the grounds of appeal. Any objection, appeal or protest not made at the time and in the manner hereinabove provided shall be deemed to be waived voluntarily by any person who might have made such appeal, protest or objection, and such person shall be deemed to have consented to the proposed assessment and any other matter on which objection, protest or appeal could be made.

§ 5368. Finality of decisions of legislative body

All the decisions and determinations of the legislative body, upon notice and hearing as aforesaid, shall be final and conclusive upon all persons entitled to appeal to the legislative body, as to all errors, informalities, and irregularities which the legislative body might have avoided, or have remedied during the progress of the proceedings or which it can at that time remedy.

§ 5369. Effect of error in proceedings; confirmation of proceedings; warrant

No assessment, warrant, or diagram, and no proceedings prior to the assessment, shall be held invalid

by any court for any error, informality, or other defect in the same, where the resolution of intention of the legislative body to do the work, has been actually published as provided in this division. When no appeal is taken or when the orders and determinations of the legislative body upon appeal have been complied with, and the legislative body is satisfied with the correctness of the assessment, the legislative body shall forthwith confirm the proceedings and the assessment and the street superintendent shall attach thereto a warrant bearing the date of such confirmation.

§ 5660. Time

No action, suit, or proceeding to set aside, cancel, avoid, annul or correct any assessment or reassessment, or to review any of the proceedings, acts or determinations therein, or to question the validity of, or to enjoin the collection of the assessments or reassessments, or to enjoin the issuance of bonds to represent the same, shall be maintained by any person unless such action is commenced within 30 days after the recording of the warrant, diagram and assessment or reassesment, and thereafter all persons shall be barred from any such action or any defense of invalidity of the assessment or of bonds issued thereon or of the reassessment if such is made and of bonds issued thereon.

§ 20410. Improvement Act of 1911; contracts; application of article

The provisions of this article shall apply to contracts by legislative bodies for the doing of work or the furnishing of materials, supplies and equipment, as provided for in the Improvement Act of 1911, Division 7 (commencing with Section 5000) of the Streets and Highways Code.

§ 20420. Notice of award; publication; recordation; notice of assessment; form

Notice of the award of the contract shall be published by the clerk.

The clerk shall, upon payment of the statutory fee prescribed therefor, record a notice of the award of contract in the office of the county recorder. Said recordation shall constitute notice to all persons that all property within the boundaries of the proposed assessment district shall be assessed at the time of the confirmation of the assessment under Chapter 16 (commencing at Section 5360) of Part 3 of Division 7 of the Streets and Highways Code to pay the costs of the improvement in proportion to the benefits which the property receives from the improvement, notwithstanding the acquisition of the property by the state or any of its agencies, or by any county, city, municipality or other public or municipal corporation. Said notice shall be substantially as follows:

NOTICE OF AWARD OF CONTRACT IN PROPOSED ASSESSMENT DISTRICT

Pursuant to the requirements of Section 5248 of the Streets and Highways Code, notice is hereby given that a contract has been awarded by _____

(Legislative body)

to _____

(Contractor)

for _____

(Nature of improvement)

in _____ District

(Improvement or assessment)

No. _____ and relating to the following described real property:

(The real property in the assessment district may be described by:

a. Stating its exterior boundaries; or

b. Giving a description thereof according to any official or recorded map; or

c. Referring to a plat or map filed with the clerk of the legislative body, which shall indicate by a boundary line the extent of the territory included in the assessment district, and shall govern for all details as to the extent of the assessment district.)

This shall constitute notice to all persons that all property within the boundaries of the proposed assessment district shall be assessed at the time of the confirmation of the assessment under Chapter 16 (commencing at Section 5360) of Part 3 Division 7 of the Streets and Highways Code to pay the costs of the improvement in proportion to the benefits which said property receives from the improvement, notwithstanding the acquisition of any such property by the state or any of its agencies, or by any county, city, municipality or other public or municipal corporation.

Reference is made to the minutes of the action taken by _____

(Legislative body)

on file in my office for full particulars.

Dated: _____

_____

(Clerk of _____)

§ 20431. Notice of irregularity in proceedings

At any time within 10 days from the date of the first publication of the notice of award of the contract, any owner of, or other persons having any interest in, any lot or land liable to assessment, who claims that any of the previous acts or proceedings relating to the work are irregular, defective, erroneous or faulty, may file with the clerk a written notice specifying in what respect the said acts and proceedings are irregular, defective, erroneous or faulty. The notice shall state that it is made pursuant to this section.

§ 20432. Waiver of objections

All objections to any act or proceeding occurring prior to the time within which such objections are permitted to be filed in relation to the work, not made in writing and in the manner and at the time specified, shall be waived, if the resolution of intention to do the work has been actually published as provided in this division.

§ 20434. Action to test validity of contracts and proceedings relating to work

An action to determine the validity of proceedings relating to the work and the validity of any contract entered or to be entered into pursuant thereto may be brought by the legislative body or by the contractor pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure. For such purpose proceedings shall be deemed to be in existence upon the award of the contract. An action may be commenced and concluded by the legislative body before the publication of the notice inviting bids, and for such purpose the proceedings shall be deemed to be in existence upon the adoption of the resolution ordering the work.

§ 20435. Conclusiveness of findings and determinations

In such action, all findings, conclusions and determinations of the legislative body which conducted the proceedings shall be conclusive in the absence of actual fraud.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on September 23, 1985, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Ira Reiner,
City Attorney
Norman L. Roberts,
Assistant City Attorney
Edward Dygert,
Deputy City Attorney
1800 City Hall East
200 North Main Street
Los Angeles, California 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 23, 1985, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)

Supreme Court, U.S.
FILED
OCT 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-517 (2)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

MILTON A. MILLER and
MANDEL M. MILLER,

Petitioners,

vs.

CITY OF LOS ANGELES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES K. HAHN, City Attorney
GARY R. NETZER
Senior Assistant City Attorney
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Attorneys for Respondent

BEST AVAILABLE COPY

26 pp

QUESTION PRESENTED

Should this Court review a decision of the Court of Appeals which held tnat Fair Assessment In Real Estate v. Mc Nary (1981) 454 U.S. 100 bars the petitioners action brought under 42 U.S.C. § 1983 challenging the levy of an assessment against their real property by a special assessment district where there are sufficient state remedies?

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No. 85-517

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

MILTON A. MILLER and MANDEL M. MILLER,

Petitioners,

vs.

CITY OF LOS ANGELES,

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Respondent City of Los Angeles respectfully opposes the Petition for Writ of Certiorari ("Petition") filed herein.

STATEMENT OF THE CASE

A. Factual Background

This is an action brougnt under 42 U.S.C. § 1983 by Milton A. Miller and Mandel M. Miller ("petitioners") challenging the inclusion of their property in an assessment district. The assessment district challenged by the petitioners was established to improve the street on which their property fronts. Appellate Record (hereafter "AR") 1. The petitioners property will be charged an amount commensurate with its benefit from the street improvements pursuant to the Improvement Act of 1911 (California

Streets and Highways Code § 5000 et seq.). The street improvements require the acquisition of the front 20 feet of tne petitioners property for which a condemnation action has been filed (AR 2, Exnibit A).

B. Proceedings Below

On January 5, 1983 petitioners filed a complaint in District Court seeking damages under 42 U.S.C. § 1983 (AR 1). The essence of the petitioners' claim is set forth at page 7 of their complaint wherein they state that the proposed street improvements should be constructed at "City expense" because the petitioners

property will not benefit from the project (AR 1 at 7).

The City filed a Motion to Dismiss the petitioners Complaint on tne ground tnat Fair Assessment in Real Estate v. Mc Nary, supra, barred the petitioners action (AR 2).

The City's motion was argued and the District Court on March 14, 1983 issued a "Memorandum Decision and Order of Dismissal" (AR 9). The petitioners sougnt reconsideration of the District Courts March 14, 1983 decision and on May 11, 1983 the District Court denied the petitioners motion to reconsider and amended its previous "Memorandum Decision and

Order of Dismissal" to show that the Court considered the adequacy of remedies available under the laws of the State of California and found that "those remedies are plain, adequate and complete" (AR 16).

The petitioners appealed the District Courts dismissal to the United States Court of Appeals for the Ninth Circuit which issued its decision on March 22, 1985. The decision is reported at 755 F.2d 1390. On June 25, 1985 the petitioners requests for rehearing and suggestion for rehearing en banc were denied. This petition follows.

SUMMARY OF ARGUMENT

The Improvement Act of 1911 (California Streets and Highway Code § 5000 et seq.) is a widely used procedure in California to fund the construction of a variety of public improvements. The Court of Appeals correctly recognized that to permit taxpayers to challenge assessments made pursuant to this act in federal court would constitute a substantial intrusion into the state taxing function and would therefore violate the principals of comity stated by this Court in Fair Assessment. Further, the Court of Appeals also

correctly held that the petitioners have adequate remedies available to them under the laws of the State of California which preclude them from seeking review of their special assessment in federal court.

ARGUMENT FOR DENIAL OF THE PETITION

THE COURT OF APPEALS' DECISION IS FULLY CONSISTENT WITH APPLICABLE PRECEDENT OF THIS COURT, AND THUS NO GROUNDS EXIST FOR THIS COURT'S REVIEW

This Court held in Fair Assessment In Real Estate v. Mc Nary, supra, 454 U.S. at 116 that:

> ". . . taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts. Such taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete, and may ultimately seek review of the state decisions in this Court."

Petitioners attempt to avoid the holding of Fair Assessment by arguing in their petition that the 1911 Act is not the kind of tax with which the comity concept is concerned (Petition at 16) and that the state remedies are not plain, adequate and complete (Petition at 9 and 18). Each of these issues will be discussed below.

A. The Mc Nary Principle Of Comity Applies To This Form of Taxation

Justice Brennan in his concurring and dissenting opinion in Perez v. Ledesma (1971) 401 U.S. 82, 128, fn 17, which was cited in Fair Assessment, 454 U.S. at 108, fn 6, sets forth the reasons for federal court deference to state tax administration:

> "The special reasons justifying the policy of federal noninterference with state tax collection are obvious. The procedures for mass assessment and collection of state taxes and

for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax administrtion might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, wnich, like issues of state regulatory law, are more properly heard in the state courts."

The policies set forth by Justice Brennan apply with equal force to this significant element of the California tax system. A California Court of Appeal described the importance of the system as a revenue raising device in the following manner:

> "For over 60 years [the Improvement Act of 1911 and the Municipal Improvements Act of 1913] have provided the most widely used procedure in California for the construction of a variety of public improvements including streets, sewers, sidewalks, water systems, lighting and public utility lines; property owners benefitted by the improvements pay for these improvements either in cash or, at their option, by

> installments over a period of time. (citation) Amicus curiae City of Los Angeles states that within its jurisdiction alone almost $15.5 million in streets, sewers, drains and incidental facilities were constructed in the three and one-half years ending December 31, 1978; almost half of the funding for these projects was paid by assessment procedures under these acts, with much of the remainder paid by federal grants as 'matching funds.' Los Angeles also states it has similar projects pending with estimated construction costs of over $52 million. (County of Fresno v. Malmstrom (1979) 94 Cal.App.3d 974, 978.)

Petitioners cite the County of Fresno case in their petition at 17, to support their contention that a special assessment is not a tax; however, it must be noted that the

issue before the California Court involved a question of statutory construction, whether or not certain provisions of the California Tax Limitation Initiative applied to the issuance of bonds pursuant to the Improvement Act of 1911, not whether the assessment procedure was a component of the state tax system.

Assessments made pursuant to the Improvement Act of 1911 are a critical element of the California tax system and, as the District Court noted in its "Memorandum Decision and Order of Dismissal":

> "this method of providing for highway improvements is truly

> a 'tax system' in that it is inextricably interwined with the fiscal policies of the state, and the administration of the improvement program." (AR 9 at 5)

The Court of Appeals further observed:

> "The power to create special assessment districts to pay the cost of street improvements is a legislative process grounded in the taxing power of the soverign." Miller v. City (9th Cir 1985) 755 F.2d 1390, 1391.

The Court of Appeals decision is therefore consistent with this Courts precedent in holding that "[t]he Mc Nary principal of comity, therefore, applies to this peculiarly local and state form of taxation." 755 F.2d at 1391.

B. The Petitioners Have Adequate State Remedies

Fair Assessment required tnat the remedies available to a taxpayer are "plain, adequate and complete" before the taxpayers action could be barred by the principals of comity (454 U.S. at 116). This Court has noted that the phrase "plain, adequate and complete" is virtually synonymous with the phrase "plain, speedy and efficient" used in the Tax Injunction Act (28 U.S.C. § 1341) (Fair Assessment, 454 U.S. at 116 fn 8). The meaning of "plain, speedy and efficient" was discussed by this Court

in Rosewell v. LaSalle National Bank (1981) 450 U.S. 503. Initially it was noted that "[o]n its face the 'plain, speedy and efficient remedy' appears to require a state-court remedy that meets certain minimal procedural criteria" (450 U.S. at 512, emphasis by the Court). This Court further noted in Rosewell that based upon the legislative history of the Tax Injunction Act, the minimal procedural criteria are met by a "full hearing and judicial determination of the Controversy" 450 U.S. at 514.

This Court has also noted in California v. Grace Brethren Church (1982) 457 U.S. 393 at 413 that it

"must construe narrowly the 'plain, speedy and efficient' exception to the Tax Injunction Act".

A "full hearing and judicial determination of the controversy" is clearly available to the petitioner. California courts will provide the "full hearing and judicial determination" to the petitioner. California courts are not reluctant to review the issues raised by the petitioner. The California Supreme Court held seventy years ago that an assessment scheme very similar to that alledged by the petitioners was not valid because the project did not confer a benefit on the assessed

property. (Spring Street Company v. City of Los Angeles, (1915) 170 Cal. 24 at 30.) The California Courts have continued to review assessment districts as is apparent from the cases cited by petitioner (Petition at 19 and 20), and the Court of Appeals (755 F.2d at 1391).

Additionally, California State Courts allow actions to vindicate federal rights under Section 1983 (Williams v. Horvath (1976) 16 Cal.3d 834) just as the Missouri Supreme Court did in Fair Assessment (454 U.S. at 116). Although, the petitioners have apparently argued that comity should not bar a Section 1983 action

(Petition at 9), Fair Assessment disposed of that issue contrary to the petitioners contentions when a Section 1983 action challenges the administration of state tax laws (454 U.S. at 105). The petitioners also had non-judicial remedies available to them before seeking judicial relief as the Court of Appeals properly noted in its decision (755 F.2d at 1391).

Accordingly, as the Court of Appeals properly held, "[t]he state remedies available to the Millers preclude them from seeking review of their special assessment in federal court". 755 F.2d at 1391.

CONCLUSION

Since the courts below properly applied applicable precedent, there is no ground under Rule 17 of the Rules of the Supreme Court to grant the Petition for Writ of Certiorari and accordingly the petition should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-517

In the Supreme Court of the United States

October Term, 1985

MILTON A. MILLER and MANDEL M. MILLER,

Petitioners,

v.

CITY OF LOS ANGELES,

Respondent.

PETITIONERS' REPLY BRIEF

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INTRODUCTION:

THE CITY'S BRIEF *ASSUMES* THAT THERE IS AN ADEQUATE STATE REMEDY (WHICH IS THE CENTRAL ISSUE BEING LITIGATED) AND *IGNORES* THE DRACONIAN FEATURES OF THE 1911 ACT ASSESSMENT SCHEME

The most striking feature of the City's brief is that it *assumes* the answer to the central issue being litigated. That issue is whether there is a plain, adequate, and complete state remedy.

Please recall, under this Court's decision in *Fair Assessment in Real Estate v. McNary* (1981) 454 US 100, federal courts *must* assume jurisdiction *if* there is no plain, adequate, and complete state remedy.

The Millers' Petition discussed the California scheme under the 1911 Act, whose underlying philosophy of no judicial invalidation is expressed in Cal Streets & Hwys Code §5369:

> "*No assessment, . . . and no proceedings* prior to the assessment, *shall be held invalid by any court for any error,* informality, *or other defect* in the same, where the resolution of intention of the legislative body to do the work, has been actually published as provided in this division." (Emphasis added.)

The Millers' Petition showed that the California courts routinely hew to this philosophy.[1]

The City's primary response is to *assume* that adequate remedies exist. (See, e.g., the City's framing of the "Question Presented." [City Br., p i])

While the City avers at pp 15-19 of its brief that it will address this issue, nothing in that discussion even attempts to describe the supposedly adequate remedies. *None* of the statutes described in the Millers' Petition is even *cited* by the City. Those statutes provide Constitutionally inadequate notice by publication (contrary to *Mullane v. Central Hanover Bank & Trust Co.* [1950] 339 US 306 and *Mennonite Bd. of Missions*

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[1]The City's response that the cases cited by the Millers make it ". . . apparent . . ." that "[t]he California Courts have continued to review assessment districts . . . (City Br., p 18) is preposterous. What the cases make ". . . apparent . . ." is that the Legislature's mandate that assessments not be invalidated has been slavishly followed by the California judiciary.

v. Adams [1983] 462 US 791), permit a government agency to condemn land and then assess the condemned owner the full amount of his just compensation *plus* the agency's attorneys' and appraisers' fees (contrary to *Norwood v. Baker* [1898] 172 US 69 and *Myles Salt Co. v. Board of Comm'rs* [1916] 239 US 478), permit an administrative agency to operate without judicial review (contrary to *St. Joseph Stock Yards Co. v. U.S.* [1936] 298 US 38), and permit a bureaucrat (rather than a court) to determine a component of just compensation (contrary to *Monongahela Nav. Co. v. U.S.* [1893] 148 US 312).

The City ignores each of the statutes and each of the cited discussions of this Court which the statutes violate. How can such argument by evasion assist this Court? If anything, it demonstrates the lack of bona fides in the City's position.

The only substantive comment offered by the City is that *seventy years ago,* in *Spring Street Co. v. City of Los Angeles* (1915) 170 Cal 24, the California Supreme Court overturned *one* assessment. (City Br., p 18) What the City does *not* tell this Court is that *Spring Street* has *never* been followed in the ensuing seventy years.[2] Rather, as in *White v. County of San Diego* (1980) 26 Cal 3d 897, 908, *Spring Street* is referred to as ". . . exceptional . . ." and disregarded. "Exception" is indeed the word for *Spring Street.* The general rule is that the property owner routinely receives less than short shrift. Indeed, he gets no shrift at all.

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[2]As one scholarly commentator noted, "For those who still desire to raise objections to the [assessment] proceedings, some support can be found in a few cases. Most of these decisions are old and are probably bad law, even though they have not been expressly overruled." (Nichols, *How Not to Contest Special Assessments in California or You Can't Beat City Hall* [1965] 17 Stan L Rev 247, 256)

The City's bland assumption that state court remedies exist, coupled with its refusal to discuss the statutes and cases which belie its assumption, confesses the Constitutional inadequacy of the California scheme and shows the necessity for this Court's intervention. Because of the rubber stamp treatment accorded 1911 Act assessments by the California courts, California government agencies have become used to this type of non-analytical argument. It always prevails in the California courts.

There is a need for the Federal courts to assume jurisdiction and right this Constitutional wrong.

CALIFORNIA CITIES DO NOT NEED THIS DRACONIAN SCHEME IN ORDER TO OPERATE

The primary argument raised by the City is that California government agencies need the 1911 Act in order to function properly. (City Br., pp 9-14)

There are two responses.

First. Assuming, *arguendo,* the truth of this assertion, it is irrelevant when the Constitutional rights of citizens are steam-rollered in the process. As this Court aptly said in *Watson v. Memphis* (1963) 373 US 526, 537:

> "[V]indication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them."

Second. The City's brief makes it seem as though the 1911 Act is the *only* assessment district legislation in California. That is false.[3]

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[3]Even if true, it is hard to see how a challenge to any *individual* project (like the one-block street widening involving two property

A skim of the California Streets & Highways Code shows no fewer than 14 other assessment acts in that Code alone.[4] The following pertinent comparisons with the 1911 Act emerge.

Item: None contains a direction like the 1911 Act (Cal Streets & Hwy Code §5369) that the judiciary is without power to interfere with any municipal decisions.

Item: None contains the multifarious waiver, "cure" of defect, and city council finality provisions of the 1911 Act. (Cal Streets & Hwys Code §§5003, 5221, 5368, 5369; Cal Pub Cont Code §§20420, 20431, 20432)[5]

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owners at bench) could have a generally crippling impact on local government.

[4]See Cal Streets & Hwys Code §§1160 et seq. [permanent road divisions]; 8100 et seq. [Separation of Grade District Act]; 10000 et seq. [Municipal Improvement Act of 1913]; 11000 et seq. [Pedestrian Mall Law of 1960]; 18000 et seq. [Street Lighting Act of 1919]; 18300 et seq. [Street Lighting Act of 1931]; 18600 et seq. [Municipal Lighting Maintenance District Act of 1927]; 19000 et seq. [Highway Lighting District Act]; 22000 et seq. [Tree Planting Act of 1931]; 22500 et seq. [Landscaping and Lighting Act of 1972]; 26000 et seq [boulevard districts]; 27000 et seq. [Bridge and Highway District Act]; 35100 et seq. [Parking District Law of 1951]; and 36500 et seq. [Parking and Business Improvement Area Law of 1979].

[5]Nine of them contain some waiver provisions. (Cal Streets & Hwys Code §§10012, 10310.2, 10312, 10355, 11309, 18076, 18364, 18691, 22093, 22509, 26003, 35275, 35469) But in 8 of those, the *amount* of the assessment is determined *first*, so the property owners know *what* they are waiving. In the ninth, if a majority of the property owners protest formation of the district, the process automatically terminates, with no ability of the City Council to override the majority protest.

Under the 1911 Act, of course, the amount is determined *after* construction (Cal Streets & Hwys Code §§5360 et seq.) and the City Council *can* impose the assessment notwithstanding a protest by the majority (Cal Streets & Hwys Code §5222).

Item: In 8 of the statutes, the amount of the assessment is determined *first,* so the property owners (and the City Council) know what they are approving or opposing. (Cal Streets & Hwys Code §§10204, 18041, 18340, 18660, 22080, 22567, 22622, 26130, 35257) By contrast, under the 1911 Act, the assessment is not determined until construction is completed. (Cal Streets & Hwys Code §5360 et seq.)

Item: In 8 of the statutes, a protest by a majority of the property owners causes proceedings to terminate. The City Council may not override the protest. (Cal Streets & Hwys Code §§1177, 11306, 19111, 22092, 26066, 27072, 35264, 35469.6, 36523) Under the 1911 Act, the City Council may do as *it* pleases, regardless of whether the affected property owners want the "improvement." (Cal Streets & Hwys Code §5222)

An assessment statute adopted in 1979 shows that local government can live without the odious features of the 1911 Act. Under the Geologic Hazard Abatement District Act (Cal Pub Res Code §§26500 et seq.), which allows use of the 1911 Act assessment procedures (Cal Pub Res Code §26587), a detailed plan must be prepared *before* the district is formed (Cal Pub Res Code §§26509, 26553), notice is given by certified mail (Cal Pub Res Code §26561), and protest by a majority causes abandonment of the project (Cal Pub Res Code §26566).

Under the Geologic Hazard system, the property owners know *what* they are facing, receive *actual* notice, and *can* control their own destiny by majority opposition. *None* of those are provided under the 1911 Act.

The 1911 Act is *sui generis.* Its unconstitutional features are present in no other assessment district legislation.

It is time for the Federal courts to examine those unconstitutional features, to right the Constitutional deprivation. The California courts have meekly accepted the Legislature's directive that the courts not review.

CONCLUSION

The Constitutional deficiencies in the 1911 Act assessment scheme are manifold.

The City's non-analytical brief and its studied refusal even to *cite* the offending statutory provisions (let alone discuss them) speaks volumes. The California courts have, for generations, permitted such non-responsive presentations to prevail. As a result, property owners have no remedy in the California courts.

There is a need for Federal Court intervention.

The Millers pray that a writ issue.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on November 1, 1985, I served the within *Petitioners' Reply Brief* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
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I declare under penalty of perjury that the foregoing is true and correct. Executed on November 1, 1985, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)